IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.966 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

ABDULKARIM RUMALKHAN SOLANKI - Respondent

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Appearance :
MR KT DAVE, APP for Appellant.
MR SR DIVETIYA for MR RAJESH M AGRAWAL for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 06/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973 (“the Code” for short) questions legality of judgment dated August 3, 1998

rendered by the learned Special Judge & Additional Sessions Judge, Banaskantha at Palanpur, in Sessions Case No.105 of 1995 by which the respondent is acquitted of the offences punishable under Sections 20(b), 22 read with Section 29 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (“the Act” for short).

2. The facts emerging from the record of the case are as under:

In the month of May 1995, Mr.J.J.Joshi was discharging duties as Deputy Superintendent of Police, C.I. Cell, C.I.D. Crime, Ahmedabad. On May 12, 1995, he received an information from his informant that a person named Abdul Karim Rumalkhan Solanki of Village Solankiya, Taluka Shiv, District Badmer, Rajsthan, was to pass in a private jeep bearing registration No.GJ-2-A-2573 on May 13, 1995, from Deesa towards Ahmedabad between 1.00 P.M. and 4.00 P.M. with big quantity of *charas.* On receipt of the information, Mr.J.J.Joshi informed his immediate official superior, i.e. Mr.Saikiya, who was then Deputy Inspector General of Police, Crime, and produced his informant before Mr.Saikiya. Mr.Saikiya also verified the information from the informant, which the informant had conveyed to Mr.Joshi. After verifying the information conveyed by the informant, D.I.G of Police Mr.Saikiya,

directed Dy.S.P. Mr.J.J.Joshi to arrange a raid. As per the instruction given by Mr.J.J.Joshi, Police Inspector Mr.I.J.Pathan, Police Inspector Mr.N.P.Raijada, Police Inspector Mr.S.C.Parmar, Police Inspector Mr.B.M.Ansari, and Head Constable Mr.Sirajkhan H. Pathan remained present in the early morning on May 13, 1995 at the office of Mr.J.J.Joshi. Mr.J.J.Joshi instructed Head Constable Mr.Sirajkhan to requisition services of two panch-witnesses. Accordingly, Head Constable Sirajkhan called two persons, i.e. (1) Bahadursinh Khengarji Sisodiya and (2) Vajubhai Naranbhai Gadhvi. The two persons summoned by Head Constable Mr.Sirajkhan were interrogated by Dy.S.P. Mr.Joshi. The two persons summoned expressed their willingness to act as panch-witnesses. Therefore, first part of the panchnama was drawn in the office of Dy.S.P. Mr.Joshi between 7.00 A.M. and 7.30 A.M.. Thereafter, the members of the raiding party reached Aseda Canal in three different government jeeps at about 12.15 hours in noon. The members of the raiding party maintained a vigil near Aseda Canal. PI Mr.Pathan and PI Mr.Parmar, who were occupying jeep bearing registration No.GJ-1-G-1348 were instructed to notice jeep bearing registration No.GJ-2-A-2573 and give appropriate signal after following the same so that the jeep could be intercepted. Jeep bearing registration No.GJ-2-A-2573 was spotted coming near Aseda Canal at

about 1.30 P.M. Thereupon, a signal, as instructed above was given by PI Mr.Pathan and, therefore, two other jeeps were brought on the road as a result of which, the driver of the jeep bearing registration No.GJ-2-A-2573 had to halt his jeep. The driver, cleaner and another occupant of the jeep bearing registration No.GJ-2-A-2573 were made to alight from the jeep. On interrogation, the driver disclosed his name to be Akhtar Husain Mohmed Husain Shaikh whereas another person disclosed his name as Ashrafbhai Hajibhai Shaikh, who was cleaner of the jeep, and the third person disclosed his name to be Abdul Karim Rumalkhan Solanki (i.e. the respondent). Dy.S.P. Mr.Joshi informed the respondent that an information was received that he was carrying large quantity of *charas* and, therefore, it was necessary to search the jeep. Before effecting the search of the jeep, Dy.S.P. Mr.Joshi offered the respondent to search the jeep in presence of a magistrate, but the said offer was declined by the respondent. Thereupon, the jeep was searched. The search resulted into find of 372 Kilograms of *charas.* Dy.S.P. Mr.Joshi demanded pass or permit from the respondent authorizing him to possess *charas* in such a big quantity, but none could be produced by the respondent. Appropriate samples were drawn and sealed. Thereafter, Dy.S.P. Mr.Joshi reduced his complaint into writing and produced the samples, *muddamal,* panchnama, his complaint and the

respondent before Deesa Rural Police Station. On the basis of the complaint lodged by Dy.S.P. Mr.Joshi, offences punishable under the provisions of the Act were registered against the respondent. After registering the offences, Dy.S.P. Mr.Joshi asked the Police Officer in charge of Deesa Rural Police Station to hand over him the samples drawn as well as *muddamal* with the accused and, thereafter, went to Narol, Ahmedabad, in the hope that he would be able to apprehend the person to whom delivery of big quantity of *charas* was to be effected by the respondent. At Narol, Dy.S.P. Mr.Joshi maintained a watch, but none came to take delivery of *charas.* Therefor, from Narol, Ahmedabad, he returned to Deesa and produced the respondent before the learned Judicial Magistrate First Class, Deesa. Except the samples drawn, Dy.S.P. Mr.Joshi again handed over the *muddamal* to Deesa Rural Police. The complaint lodged by Dy.S.P. Mr.Joshi was investigated by himself. He recorded statement of those, who were supposed to be conversant with the facts of the case. The samples drawn were sent to Forensic Science Laboratory for analysis. The report of the analysis indicated that the substance analyzed was *charas* within the meaning of the Act. On completion of the investigation, the respondent was chargesheeted in the Court of learned Special Judge, Banaskantha at Palanpur, on the basis of which, Sessions Case No.105 of 1995 was

registered against him. In the charge-sheet, other five accused, i.e. (1) Muso of Pakistan; (2) Mohib Haji Rahim residing at Rikhiyani, Gadra Road Police Station, District: Badmer, Rajsthan; (3) Haiderkhan Aklukhan Sond residing at Solankiya, Taluka: Shiv, District: Badmer, Rajsthan; (4) Ayubkhan @ Iqbalkhan Umarkhan @ Takshirkhan residing at 96, Hamid Building, Room No.33, Second Floor, Maulana Azad Road, Agnipada Police Station, Bombay City, Maharashtra; and (5) Imtiyazkhan Umarkhan Pathan residing at Bombay, were shown as absconding accused.

3. The learned Special Judge, Banaskantha at Palanpur, framed necessary charge against the respondent at Exh.7. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (1) panch Bahadursing Khengarsing Sisodiya as P.W.-1 at Exh.18; (2) Suleman Gulabbhai Shaikh as P.W.-2 at Exh.57; (3) Manager of Rest House, Deesa, i.e. Ashokkumar Vadilal Modi as P.W.-3 at Exh.60; (4) panch Ashokkumar Kishanchand Sindhi as P.W.-4 at Exh.63; (5) person who weighed the substance carried out by the respondent, i.e. Shantilal Dipaji Soni, as P.W.-5 at Exh.64; (6) Driver of Jeep in which the respondent was found carrying big quantity of *charas,* i.e. Akhtar Husain Mohmed Husain Shaikh as P.W.-6 at Exh.69; (7) Head Constable Lalsing

Umedsing as P.W.-7 at Exh.80; (8) PI Mr.Shivabhai Chelabhai Parmar as P.W.-8 at Exh.88; (9) Bababhai Savabhai as P.W.-9 at Exh.94; (10) Writer Head Constable Gujaraji Bhavaji Prajapati as P.W.-10 at Exh.96; and, (11) Dy.S.P. Mr.J.J.Joshi as P.W.-11 at Exh.101, to prove its case against the respondent. The prosecution also produced documentary evidence such as; forwarding letter with which *muddamal* was produced before the Court at Exh.16; panchnama of search of jeep and seizure of 372 Kilograms of *charas* at Exh.19; contract relating to jeep at Exh.59; extract from register maintained at Vishram Gruh, Deesa, at Exh.61; receipt issued by Shantilal Soni for having weighed substance found from the possession of the respondent at Exh.65; forwarding letter addressed by Mr.J.J.Joshi with which *muddamal,* panchnama, complaint, accused, etc. were forwarded to the Police Officer in charge of Deesa Rural Police Station at Exh.82; entry made into the Police Station Diary indicating that the complaint was registered against the respondent at Exh.84; bill indicating that ten tins were purchased by Dy.S.P. Mr.Joshi for storing *muddamal* at Exh.89; entry indicating that the information received was reduced into writing by Mr.Joshi at Exh.102; complaint of Dy.S.P. Mr.Joshi at Exh.103; panchnama of place from where *muddamal* was searched at Exh.105; reports of Forensic Science Laboratory at Exhs.107 and 108; report under

Section 42 subsection (2) of the Act at Exh.109; reasons of arrest communicated to the respondent at Exh.111; report under Section 57 by Mr.Joshi to his immediate official superior as required by Section 57 of the Act at Exh.112; etc. in support of its case against the respondent.

4. After recording of evidence of the prosecution witnesses was over, the learned Special Judge explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, the respondent claimed that a false case was foisted upon him. However, he did not lead any evidence in his defence.

5. On scrutiny of the evidence adduced by the prosecution, the learned Judge held that though the offending substance was seized near Aseda Canal, the same was not deposited with Deesa Rural Police Station, but the *muddamal* with the respondent was taken to Ahmedabad, which was a suspicious circumstance and tampering with *muddamal* was not ruled out. The learned Judge noticed that while sealing the samples drawn, the slips bearing signatures of panch witnesses were not affixed on the samples, but were kept loose and held that tampering with

the samples drawn was also not ruled out. According to the learned Judge, Dy.S.P. Mr.Joshi had failed to submit report to the learned Magistrate as required by Section 102 subsection (3) of the Code and, therefore, the respondent was entitled to acquittal in view of the decision of the High Court rendered in **Shivabhai Gajmalbhai vs. State of Gujarat, 1996 (2) G.L.R. 64.** The learned Judge found that the time at which the members of the raiding party reached Aseda Canal and seized offending substance from the jeep differs as mentioned by the Police Officers and the jeep driver Akhtar Husain as a result of which, the case of the prosecution was suspicious. The learned Judge noticed that the two panchas were not local panchas, asked to witness the search of the jeep and seizure of *charas* therefrom, but selected from Ahmedabad, which was also a suspicious circumstance. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent vide judgment and order dated August 3, 1998 giving rise to instant appeal.

6. This Court has heard Mr.K.T.Dave, learned Additional Public Prosecutor for the appellant-State, and Mr.S.R.Divetia, learned counsel appearing for Mr.R.M.Agrawal, learned counsel of the respondent, at length and in great detail. This Court has also

undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The plea that the report as contemplated by Section 102 subsection (3) of the Code was not forwarded by Dy.S.P. Mr.Joshi to the learned learned Magistrate and, therefore, the case of the prosecution is doubtful, cannot be accepted. It is true that after construing the provisions of Section 52 subsection (3) and Section 51 of the Act, the Division Bench of this Court in **Shivabhai Gajmalbhai (supra),** has held that the provisions of the Act are not inconsistent with the provisions of Section 102(3) of the Code and, therefore, non-forwarding of the report under Section 102(3) of the Code, vitiates the trial. However, this Court is of the opinion that while laying down the above noted principle, the Division Bench had no occasion to consider the question whether the provisions of Section 102 subsection (3) of the Code would be applicable to search and seizure effected under the provisions of the Act of 1985. The Act of 1985 is a code in itself. In view of Section 51 of the Act, the provisions of the Code shall apply, insofar as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches and seizures made

under this Act. Under the Act, the authorized officer under Sections 41 and 42 of the Act or the officer deemed to be so authorized in view of Section 74 of the Act, is required to follow special procedure laid down under Sections 50, 52, 55 and 57 of the Act. Section 57(2) of the Act, *inter alia,* obliges the officer effecting seizure to report the seizure to his immediate official superior. The officer acting under Sections 41 and 42 of the Act is required to maintain record of following the provisions aforesaid. Non-observance of these provisions may in a given case vitiate the trial. When the State Government decides to authorize officer of the department other than the police to exercise power under Sections 41 and 42 of the Act, the provisions of Section 156 of the Code will not be attracted. The Police Officer authorized to act under the Act either in view of Section 74 of the Act as they would be deemed to have been appointed under the Act and appointed under the Act, are required to follow the procedure as provided under Sections 50, 52, 55 and 57 of the Act. Seizure contemplated by Section 102(3) by any police officer is quite different than the seizure contemplated under the Act by certain gazetted and specially empowered officers. To this extent duty cast to report the seizure to the learned Magistrate under Section 102(3) will have to be regarded as inconsistent with duty to report seizure by the specially

empowered officer under Section 57(2) of the Act to his immediate official superior. It will not be out of context to mention in this case that seizure was conducted by Mr.Joshi, who was then Dy.S.P.. He was a gazetted officer as well as an empowered officer under Section 41 subsection (2) of the Act in view of Notification No.GH-L.14-NDS-1087(i)-M. Dated 15th June 1987, issued by the Government of Gujarat in exercise of powers conferred on it by subsection (2) of Section 41 of the Act. Mr.Joshi had not effected the search of the jeep and seizure of *charas* under the provisions of the Code, but had effected the search of jeep and seizure of *charas* pursuant to special empowerment made in his favour under Section 41(2) of the Act. Therefore, this Court is of the firm opinion that it was not necessary for him to report the search and seizure to the learned Magistrate as contemplated under Section 102(3) of the Code. The search and seizure effected under the Act will have to be regarded as inconsistent with the search and seizure to be effected under the Code as the officer effecting the search and seizure under the Act has to follow a special procedure. Therefore, the view taken by the Division Bench in **Shivabhai Gajmalbhai (supra),** cannot be accepted for coming to the conclusion that the trial has vitiated as the report was not forwarded by Dy.S.P. Mr.Joshi to the learned Magistrate as contemplated by Section 102(3)

of the Code. The judicial comity and discipline demands that the matter will have to be referred to a larger Bench of this Court as this Court is not in agreement with the view expressed by the Division Bench in abovereferredto decision. However, it is not necessary to undertake such exercise because of the interpretation of Section 102(3) of the Act.

8. The language employed by the legislature in subsection (1) of Section 102 of the Code deserves to be noticed, which reads as under:

> *"102(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence."*

In this case, there was no suspicion in the mind of Dy.S.P. Mr.Joshi that an offence was committed by the respondent. In fact, on May 12, 1995, a specific information was received by Dy.S.P. Mr.Joshi that a person named Abdul Karim Rumalkhan Solanki of Village Solankiya, Taluka: Shiv, District: Badmer, Rajsthan, was to travel in the private jeep bearing registration No.GJ-2-A-2573 with big quantity of *charas* on May 13, 1995 between 1.00 P.M. and 4.00 P.M. and that he was to come from Deesa to deliver the quantity of *charas* at

Ahmedabad. Further, the information received by him was verified by D.I.G. of Police Mr.Saikiya, who had directed him to arrange a raid. Thus, Dy.S.P. Mr.Joshi had no suspicion as contemplated by Section 102(1) of the Code.

9. This question has been squarely considered by the Division Bench of this Court in **Abdul Kader Jusab Sandhi & Another vs. State of Gujarat, 2002 (2) G.L.R. 1212.** The Division Bench has, *inter alia,* held as under in paragraph 17.1 of the reported decision.

> *"... Section 102 of the Code of Criminal Procedure will come into picture only if the police officer has seized the property which is alleged or suspected to have stolen or is found under circumstance which creates suspicion of the commission of any offence. If the property is seized only under these circumstances, then the provision of sub-sec. (3) of Sec.102 is required to be followed. In the instant case, there was no question of finding a person with a property under circumstances creating suspicion of commission of any offence. But, in fact, persons were found with contraband articles in their possession and they were arrested in view of the provisions contained under the N.D.P.S.Act".*

In view of the principles laid down in later decision of this Court, this Court is of the opinion that provisions of Section 102 of the Code are not applicable to the facts of the case on hand.

10. Even if one were to hold that the provisions of

Section 102(3) of the Code are applicable to search of vehicle and seizure of contraband substance therefrom under the Act, this Court finds that report under Section 157 of the Code was forwarded to the learned Magistrate on the next day, i.e. as early as possible and without any avoidable delay. While forwarding the report under Section 157 of the Code, all necessary facts such as information received, search of the jeep, seizure of contraband substance namely *charas* and its quantity etc. were mentioned, which will have to be regarded as report under Section 102(3) of the Code. It is well to remember that no form of submitting report under Section 102(3) of the Code is prescribed under the Code. Therefore, the report submitted by the Police Officer under Section 157 of the Code will have also to be regarded as report contemplated under Section 102(3) of the Code. There can always be a combined report under Section 102(3) and Section 157 of the Code. In view of this discussion, the plea that there is breach of provisions of Section 102(3) of the Code and, therefore, the respondent is entitled to acquittal, cannot be accepted and is hereby rejected.

11. Though the first plea raised on behalf of the respondent is not accepted by the Court, this Court finds that the prosecution has failed to prove its case against the respondent beyond reasonable doubt. According to the

prosecution, the jeep in which the respondent was found transporting the *charas* was intercepted near Aseda Canal and after effecting seizure, the *muddamal* was handed over to Police Officer in charge of Deesa Rural Police Station. However, the testimony of Writer Head Constable Gujaraji Bhavaji Prajapati, who was Police Officer in charge of Deesa Rural Police Station, recorded at Exh.96 would indicate that the *muddamal*, in fact, was not handed over to him and was kept in the jeep and that after lodging the complaint, *muddamal* and the accused were taken by Dy.S.P. Mr.Joshi with him to Ahmedabad. Normally, the *muddamal* handed over by a Police Officer at the Police Station cannot be taken back in his custody without appropriate orders from the concerned learned Magistrate. This scheme is envisaged by the provisions of Sections 51 and 55 of the Act. Section 55, *inter alia,* provides that *an officer in charge of a Police Station shall take charge of and keep in safe custody, pending the orders of the Magistrate, the articles seized under the Act within the local area of that police station and which may be delivered to him*. The record shows that the *muddamal* was handed over to the Police Officer in charge of Deesa Rural Police Station for safe custody. Therefore, it was not open to Dy.S.P. Mr.Joshi to take back the custody of the *muddamal* and move with the *muddamal* from Deesa to Ahmedabad, and Ahmedabad to Deesa.

Moving with *muddamal* and samples drawn from one place to another after they were handed over on paper to Deesa Rural Police Station, does not rule out possibility of tampering with the same. This breach on the part of Dy.S.P. Mr.Joshi will have to be viewed in the light of other deficiencies emerging from the record of the case.

12. The record shows that after drawing samples, Dy.S.P. Mr.Joshi had kept the slips bearing signatures of the panch-witnesses in loose condition and had not affixed the slips on the tins. The correct procedure of the sealing has been laid down by the Division Bench of this Court comprising B.C.Patel, J (as he then was) and A.L. Dave, J., vide judgment dated August 17, 2001 rendered in *Criminal Appeal No.323 of 1996*, which was filed by *Jitendra @ Sanjaykumar Suryakant Desai against the State of Gujarat.* In the said unreported decision, the Division Bench of this Court has held as under:

> *"It is very clear from the evidence of the Investigating Officer, P.S.I.-Ramgadhiya (Exh.55), Dy.S.P., A.T.S., Kantilal Modi (Exh.60) and Panch-Pareshbhai Tribhovandas Brahmbhatt (Exh.9) that, after drawing the samples, at the time of sealing the samples as well as the remainder of the contraband seized, the slips containing signatures of the Panch witnesses and the Police Officer were placed inside the bags, thereafter the bags were stitched and wax seals were applied. There is no dispute that the Seal remains in custody of the Police. The possibility of tampering with the muddamal at a later stage and then again resealing*

the same by the Investigating Agency cannot be ruled out. The very purpose behind carrying out the search, taking of the sample and sealing in presence of Panch witnesses is to ensure that there is no scope of any mischief in procedure required to be followed. At the time of sealing, slips containing signatures of Panch witnesses as well as the Investigating Officer are affixed on the articles seized and a seal is applied over it, so that, in case of any attempt for tampering with the articles seized, the seal would be broken or the slip would be torn which would immediately reveal such an attempt. If the slip is put inside as was done here, as discussed earlier, the possibility of tampering cannot be ruled out. Under the circumstances, the procedure followed for sealing in the instant case cannot be said to be proper and free from any possibility of tampering. The procedure, therefore, cannot be said to be beyond the scope of any reasonable doubt and in that event, benefit must go to the accused."

In view of what has been laid down by the Division Bench of this Court in abovequoted unreported decision, there is no manner of doubt that the sealing procedure, which was resorted to by Dy.S.P. Mr.Joshi, was not foolproof and possibility of tampering with the samples drawn was not ruled out at all.

13. The record of the case further shows that in this case, Dy.S.P. Mr.Joshi had received the information from Akhtar Husain Mohmed Husain Shaikh, who was driver of the jeep bearing registration No.GJ-2-A-2573 and who is examined by the prosecution as P.W.-6 at Exh.69. This witness has stated in his testimony before the Court that the respondent was doing business of selling and purchasing goats. According to this witness, after search

of the jeep and seizure of large quantity of *charas* therefrom, the *muddamal,* etc. were taken by Dy.S.P. Mr.Joshi to Deesa Rest House where the second part of the panchnama was written and completed whereas Dy.S.P. Mr.Joshi has maintained before the Court that the second part of the panchnama was drawn at the spot itself. This witness has further stated that on the day of incident, he had gone to see Dy.S.P. Mr.Joshi in his office situated at Ahmedabad, but this fact is not referred to at all by Dy.S.P. Mr.Joshi in his testimony recorded before the Court. According to the witness, he in the company of Police Officers had gone to Aseda Canal, but this fact is also not mentioned by Dy.S.P. Mr.Joshi in his evidence tendered before the Court. According to this witness, after reaching the canal, he had gone in a private vehicle to Deesa and at that time, he was accompanied by the Policemen, but this fact is also not mentioned by Dy.S.P. Mr.Joshi before the Court. What is relevant to notice is that in paragraph 8 of his testimony, witness Akhtar Husain Shaikh has stated that narcotic drug seized was not loaded in the jeep, which he was driving. It is relevant to notice that witness Akhtar Husain was maintaining himself by driving jeep bearing Registration No.GJ-2A-2573 belonging to Dolatbhai Khatri of Deesa and getting salary of Rs.1000/- per month. Further, in paragraph 12 also, witness Akhtar Husain has

maintained that it had not happened that on the day of incident, the jeep, which was driven by him was intercepted at 1.30 P.M. near Aseda *patia,* and therefrom the offending substance was found. It is relevant to notice that the learned Public Prosecutor, who conducted the trial neither thought it fit to reexamine the witness nor obtain any clarification from him at all. Thus, the testimony of the informant of Dy.S.P. Mr.Joshi, who was driving the vehicle in question, makes the whole case of the prosecution highly doubtful.

14. Having noticed salient features appearing from the testimony of witness Akhtar Husain, it would be relevant to notice the testimony of panch witness Bahadursing Khengarji, who has supported the prosecution. Panch Bahadursing is examined by the prosecution as P.W.-1 at Exh.18. This witness has stated in his testimony before the Court that after effecting the search and seizure near Aseda Canal, he had straightaway come to Ahmedabad and that Dy.S.P. Mr.Joshi, driver Niyazkhan and two panch-witnesses had also come with him to Ahmedabad. This statement is made by witness in paragraph 26 of his testimony, which forms part of his cross-examination. Meaning thereby, the whole story narrated by Dy.S.P. Mr.Joshi that after the *charas* was seized, the *muddamal* was produced before Deesa Rural Police Station and,

thereafter, the accused with the *muddamal,* was taken to Narol, Ahmedabad, becomes suspicious. In the case of panch-witness also, neither he could be reexamined by the learned Public Prosecutor, who conducted the trial, nor his clarification could be obtained. Therefore, the statement made by the witness in his cross-examination will have to be accepted and acted upon by the Court, which, if accepted, makes the prosecution case highly doubtful. Further, panch Bahadursing in his evidence has stated that the seal, which was applied on the samples drawn was having inscription of 'Dy.S.P.', but on the jute bag containing the *muddamal,* seal bearing inscription of 'P.I., C.I.D. Crime, Ahmedabad' was applied. Why two different seals were used could not be explained by any prosecution witness. Further, the panchnama indicating search of the jeep and seizure of *charas* of 372 Kilograms therefrom, produced by the prosecution at Exh.18, shows that the seal bearing inscription of 'P.I., C.I.D. Crime, Ahmedabad (G.S.)' was applied on the samples drawn as well as reserved *muddamal.* However, the report of the Forensic Science Laboratory would indicate that on the samples received for analysis, the seal bearing impression of 'P.I., C.I.D., Crime, Ahmedabad (G.S.)' was found. The discrepancy in the evidence regarding the seal used for the purpose of sealing the samples drawn, also raises a

doubt about the prosecution case that the samples were sealed as claimed by Dy.S.P. Mr.Joshi. There is every possibility that samples which were sealed at the spot were never dispatched to Forensic Science Laboratory for analysis and samples drawn in other case were sent to Forensic Science Laboratory for analysis. On the facts and in the circumstances, this Court is of the opinion that in view of serious deficiencies found in using the seal, possibility of tampering with the samples drawn cannot be said to have been completely ruled out.

15. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in

the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of **(1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhari, AIR 1967 SC 1124, and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.** On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

16. For the foregoing reasons, the appeal fails and is dismissed. It may be mentioned that instant appeal was placed for admission hearing before Division Bench comprising M.S.Parikh & A.K.Trivedi, JJ., and after hearing the learned Additional Public Prosecutor, leave was granted and the appeal was admitted vide order dated March 1, 1999. The record further shows that on the same day, non-bailable warrant was ordered to be issued against the respondent and as the warrant was executed, the respondent is in jail. The appellant is, therefore, directed to release the respondent from Jail immediately

unless presence of the respondent in Jail is needed with reference to any other case. *Muddamal* be disposed of in terms of the directions given by the learned Judge of the trial Court in the judgment impugned in the appeal.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra